INDEX

	Page
Opinions below	1
Jurisdiction	1
Question presented	2
Statute involved	2
Statement	2
1. The information	3
2. The proceedings below	5
Argument	6
Conclusion	12

CITATIONS

Cases:

Binderup v. *Pathe Exchange, Inc.*, 263 U.S. 291	9
Las Vegas Merchant Plumbers Ass'n v. *United States*, 210 F. 2d 732, certiorari denied, 348 U.S. 817	9
Mandeville Island Farms, Inc v. *American Crystal Sugar Co.*, 334 U.S. 219	10
Northern California Pharmaceutical Ass'n v. *United States*, 306 F. 2d 379, certiorari denied, 371 U.S. 862	7, 10
Pevely Dairy Co. v. *United States*, 178 F. 2d 363, certiorari denied, 339 U.S. 942	9, 10
Plymouth Dealers' Ass'n of Northern California v. *United States*, 279 F. 2d 128	10
Standard Oil Co. v. *Federal Trade Commission*, 173 F. 2d 210, reversed, 340 U.S. 231	8
Swift & Co. v. *United States*, 196 U.S. 375	7
United States v. *Chrysler Corp. Parts Wholesalers*, 180 F. 2d 557	6, 11
United States v. *Detroit Sheet Metal & Roofing Contractors Ass'n*, 116 F. Supp. 81	11
United States v. *Employing Plasterers Ass'n*, 347 U.S. 186	7, 10
United States v. *General Motors Corp.*, 121 F. 2d 376, certiorari denied, 314 U.S. 618	9, 11

Cases—Continued Page

United States v. *St. Louis Dairy Co.*, 77 F. Supp. 853, affirmed, 178 F. 2d 363, certiorari denied, 339 U.S. 942 11

United States v. *Universal Milk Bottle Service*, 85 F. Supp. 622, affirmed, 188 F. 2d 959 ..... 9, 10

United States v. *Women's Sportswear Manufacturers Ass'n*, 336 U.S. 460 10

Walling v. *Jacksonville Paper Co.*, 317 U.S. 564 ..... 8, 9

Statute:

Sherman Act, Section 1, 15 U.S.C. 1 ..... 2, 3

In the Supreme Court of the United States

OCTOBER TERM, 1964

No. 335

R. H. WRIGHT, INC., AND ROBERT J. HUMMEL,
PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. A3-A17) is reported at 329 F. 2d 860. No opinion was filed by the district court in dismissing the information.

JURISDICTION

The judgment of the court of appeals was entered on March 26, 1964. On June 10, 1964, the court of ap-

peals denied petitioners' timely motion for a rehearing. On July 2, 1964, Mr. Justice Clark extended the time for filing a petition for a writ of certiorari to and including August 10, 1964. The petition was filed on July 31, 1964, and was served on August 10, 1964. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether the court of appeals correctly held that the information, charging price-fixing in violation of the Sherman Act, sufficiently alleged a restraint of interstate or foreign commerce.

STATUTE INVOLVED

Section 1 of the Sherman Act, 15 U.S.C. 1, provides in pertinent part:

> Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several states, or with foreign nations, is declared to be illegal. * * * Every person who shall make any such contract or engage in any such combination or conspiracy * * * shall be deemed guilty of a misdemeanor, and, on conviction thereof, shall be punished by fine not exceeding fifty thousand dollars, or by imprisonment not exceeding one year, or by both said punishments, in the discretion of the court.

STATEMENT

On March 7, 1962, the United States of America filed an information charging three corporations and

an officer of each, including the petitioners,[1] with a conspiracy in restraint of trade in violation of Section 1 of the Sherman Act, 15 U.S.C. 1. The district court dismissed the information for failure to allege a restraint of interstate or foreign commerce, and the court of appeals reversed, holding that the information charged a violation of the Sherman Act.

1. *The Information.* The information charged the defendants with combining and conspiring among themselves and with other co-conspirators to raise, fix, stabilize, and maintain prices at which the defendants sold hot mix asphalt and other asphalt materials[2] to paving contractors in Broward County, Florida, and to State, county and local governmental-awarding authorities for use in that area (R. 13-14). The alleged effects of the conspiracy were an increase in the price of asphalt materials sold in the Broward County area, and the suppression and elimination of price competition among the defendant

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[1] The information named as defendants South Florida Asphalt Co. and its President, Joseph J. Packo; East Coast Asphalt Corp. and its Vice-President, Eugene G. Ballard; and R. H. Wright, Inc. and its President, Robert J. Hummel (R. 8-9). Only R. H. Wright, Inc. and Robert J. Hummel have petitioned for certiorari.

[2] "Asphalt materials" were defined in the information as paving materials derived from crude petroleum, including "hot mix asphalt" and other materials. Hot mix asphalt is made by mixing rock, sand and "bitumen." Bitumen is a heavy residue of hydrocarbons obtained as a byproduct in refining crude oil, which is used as "the binding agent" in the production of asphalt materials. See Paragraph 1 of information, R. 7.

asphalt suppliers in the sale and distribution of asphalt materials (R. 15).[3]

With respect to the restraint of interstate or foreign commerce, the information alleged that bitumen is a "vital ingredient" and "the binding agent" in the manufacture of "hot mix asphalt" which is used as a paving material for roads and highways (R. 7, 9); that more than 95 percent of all bitumen purchased by asphalt suppliers in the Broward County, Florida, area "is purchased directly from producers and refiners of petroleum products located in Venezuela and States other than Florida and is transported in interstate and foreign commerce to said asphalt suppliers through temporary storage facilities at deep water ports along the Florida coast" (R. 10); that shipments of bitumen from outside the State of Florida were scheduled by producers to meet the requirements of asphalt suppliers (R. 11-12); that "substantial quantities of bitumen" were shipped into Florida "in direct response to orders, understandings, or commitments by asphalt suppliers to purchase bitumen in connection with specific paving projects" (R. 12); that other shipments of bitumen into Florida were "based on anticipation

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[3] The information alleged that the value of the bitumen sold in the Broward County area from January 1, 1958, to June 1, 1961, "was approximately $2,168,231.76," of which 85% was purchased by "defendant and co-conspirator asphalt suppliers" (R. 12); and that the value of asphalt materials sold in the Broward County area in 1960 exceeded $3,300,000, of which "approximately $3,000,000 or 90% was sold by the three defendant asphalt suppliers" (R. 13).

of current supplier demand" (R. 12); and that defendant asphalt suppliers acted "as conduits through which bitumen flows in a continuous uninterrupted stream" from points of origin outside Florida "to its final use in paving surfaces in the Broward County area" (R. 12).

The information further alleged that the transportation and handling of bitumen required special equipment to keep it at a high temperature in order to maintain it in a liquid state; that tanker loads of bitumen were regularly delivered every four or six weeks; that the bitumen was then stored in specially heated tanks for delivery to asphalt suppliers; and that the asphalt was transported from "said facilities in trucks provided by common carriers or by customers, including defendant asphalt suppliers" (R. 11).

2. *The Proceedings Below.* The defendants moved to dismiss the information on the ground (R. 21-24; 29-35; 84-86), *inter alia*, that it failed to charge or allege facts to show that the sale and distribution of asphalt materials "is interstate and foreign or is other than local or int[ra]state in character" (R-22). The district court granted the motions, ruling from the bench that "there was no uninterrupted flow of commerce, and there was no commerce controlled by the defendants" (R. 75). The subsequent order of dismissal stated that "the information was defective in failing to allege that the defendants have engaged in any acts or combination in the form of trust or otherwise, or conspiracy or have made any contracts in restraint of trade or commerce among the several

states or with foreign nations within the meaning of [Section 1 of the Sherman Act]" (R. 89).[4]

On appeal by the United States, the Fifth Circuit reversed (Pet. A3-A17). It held that the information adequately charged a restraint of interstate or foreign commerce on two alternative theories: It held (1) that bitumen was *in* the flow of such commerce until its final use in paving surfaces in Broward County, (Pet. A13-A15); and (2) that the defendants' acts adversely *affected* such commerce (Pet. A13-A16).

ARGUMENT

In holding that the information, considered in its entirety (*United States* v. *Chrysler Corp. Parts Wholesalers*, 180 F. 2d 557, 558 (C. A. 9)), sufficiently charges a combination and conspiracy in restraint of interstate and foreign commerce, the court of appeals correctly applied settled principles governing the scope of the commerce clause. There is no occasion for further review.

The facts set forth in the information demonstrate that the defendants' alleged transactions in asphalt materials are subject to the Sherman Act because (1)

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[4] This ground was specified in the district court's order of March 28, 1962 (R. 89). A prior order of dismissal had been entered on March 16, 1962 and the United States requested clarification to indicate that the information was being dismissed solely because of the commerce issue and not on the various other grounds alleged in the motions to dismiss. The district court had indicated at argument that if reversed on the commerce point, it would proceed to trial (R. 76-77).

they are in the flow of interstate or foreign commerce; or (2) they affect such commerce.

1. Interstate or foreign commerce "is not a technical legal conception, but a practical one, drawn from the course of business"; and it is determined by "expectations" as to the eventual use of goods (*Swift & Co.* v. *United States*, 196 U.S. 375, 398). Its flow must be appraised by looking to "the usual course of the whole trade, what ultimate disposition of the product is contemplated by the business people involved" (*Northern California Pharmaceutical Ass'n* v. *United States*, 306 F. 2d 379, 387 (C.A. 9), certiorari denied, 371 U.S. 862). Here, the information alleged that bitumen was imported into Florida for ultimate use in paving surfaces, and that, defendants and other asphalt suppliers acted "as conduits" through which the bitumen flowed "in a continuous uninterrupted stream * * * to its final use" (R. 12).[5]

The continued interstate or foreign flow of the bitumen until its use in Broward County is also established by the specific supporting allegation of the information that the interstate or foreign shipments were made "in direct response to orders, understandings, or commitments by asphalt suppliers."[6]

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[5] This allegation of the information cannot be ignored, as petitioners attempt to do (Pet. 4), by designating it as a "conclusion of the pleader." As the Court stated in *United States* v. *Employing Plasterers Ass'n*, 347 U.S. 186, 188, whether charges are called "allegations of fact" or "conclusions of the pleader", they must be taken into account in deciding whether the government is entitled to a trial on the issues.

[6] Petitioners seek to dispute the factual allegations of the information, asserting that they do not order bitumen, but

This allegation is sufficient under *Walling* v. *Jacksonville Paper Co.*, 317 U.S. 564, 568-569, which held that a shipment remains in the flow of commerce whether shipped pursuant to "prior orders" or "pursuant to a pre-existing contract or understanding with the customer." There can be no question, as stated by the court of appeals, that "[e]ven if such [bitumen] shipments were not in response to direct orders from the defendants, the arrangements and understandings alleged were sufficient" (Pet. A13).

The continued flow of commerce is further shown by the allegation (R. 12) that the ultimate local sales by asphalt suppliers, including the defendants, were anticipated when the interstate and foreign shipments of bitumen were made. Anticipation of demand has been relied upon in numerous antitrust cases to establish that local sales were in the flow of commerce. Thus, in *Standard Oil Co.* v. *Federal Trade Commission*, 173 F. 2d 210, 213-214 (C.A. 7), affirmed on this point, reversed on other grounds, 340 U.S. 231, 238, the court stated with respect to local gasoline sales:

> Although the gasoline was not brought to River Rouge [Michigan] pursuant to orders already taken, the demands of the Michigan territory were fairly constant, and the petitioner's custo-

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rather purchase it on an occasional basis; and that, when the bitumen is brought into Florida, there is no certainty when, by whom, and how it is to be used (Pet. Br. 7). Even if these assertions were significant on the commerce issue, which we deny, the contrary allegations of the information must be assumed to be correct at this stage.

> mers' demands could be accurately estimated, so the flow of the stream of commerce kept surging from Whiting [Indiana] to Detroit [Michigan].[7]

In the instant case there were similar allegations of a "stream of commerce" in bitumen resulting from the "anticipation" by the oil companies of the "fairly constant" demands of the asphalt suppliers. The information alleges that bitumen must be kept in a liquid state at high temperatures; that storage is therefore temporary; and that new shipments of bitumen are regularly scheduled every four to six weeks for delivery to asphalt suppliers (R. 11). And since the defendant corporations and their co-conspirators allegedly purchased 85 percent of the bitumen sold in the Broward County area, it necessarily follows that most of the bitumen shipped by the oil companies into the storage tanks at Fort Everglades, Florida, would be in anticipation of their needs. Moreover, the flow of commerce plainly was not terminated by the temporary storage,[8] or by the mixing of bitumen

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[7] To the same effect are, *e.g.*, *Las Vegas Merchant Plumbers Ass'n* v. *United States*, 210 F. 2d 732, 740, (C.A. 9), certiorari denied, 348 U.S. 817; *Pevely Dairy Co.* v. *United States*, 178 F. 2d 363, 366 (C.A. 8), certiorari denied, 339 U.S. 942; *United States* v. *General Motors Corp.*, 121 F. 2d 376, 401 (C.A. 7), *certiorari denied*, 314 U.S. 618; *United States* v. *Universal Milk Bottle Service*, 85 F. Supp. 622, 629 (S.D. Ohio), affirmed, 188 F. 2d 959 (C.A. 6).

[8] *Walling* v. *Jacksonville Paper Co.*, 317 U.S. 564; *Binderup* v. *Pathe Exchange, Inc.*, 263 U.S. 291, 309; *Standard Oil Co.* v. *Federal Trade Commission*, 173 F. 2d 210, 214 (C.A. 7), affirmed on this point, reversed on other grounds, 340 U.S. 231, 238. That the interstate or foreign shipment and the

with rock and sand to make the asphalt materials which were the subject matter of the conspiracy.[9]

2. Even assuming *arguendo* that the alleged flow of commerce ended before petitioners' sales of asphalt materials, the court of appeals correctly held that the information was sufficient because it alleged an adverse effect upon commerce (Pet. A15-A16). The Sherman Act applies not only to restraints on commodities in the flow of interstate commerce, but also to local acts which substantially affect such commerce, regardless of whether the local transactions precede the shipment in interstate commerce (*Mandeville Island Farms, Inc.* v. *American Crystal Sugar Co.*, 334 U.S. 219), occur between such shipments (*United States* v. *Women's Sportswear Manufacturers Ass'n*, 336 U.S. 460), or follow such shipments (*United States* v. *Employing Plasterers Ass'n*, 347 U.S. 186).

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storage, were done by defendants' suppliers, not by defendants, does not affect the flow of commerce. *Northern California Pharmaceutical Ass'n* v. *United States*, 306 F. 2d 379 (C.A. 9), certiorari denied, 371 U.S. 862; *Plymouth Dealers' Ass'n of Northern California* v. *United States*, 279 F. 2d 128 (C.A. 9); *Pevely Dairy Co.* v. *United States*, 178 F. 2d 363 (C.A. 8), certiorari denied, 339 U.S. 942.

[9] The interstate or foreign flow of bitumen, the "vital ingredient" in asphalt materials, is sufficient to establish Sherman Act jurisdiction over the local sales of the materials made in Florida from bitumen. See *Mandeville Island Farms, Inc.* v. *American Crystal Sugar Co.*, 334 U.S. 219, 238; *Plymouth Dealers' Ass'n of Northern California* v. *United States*, 279 F. 2d 128, 135 (C.A. 9); *Universal Milk Bottle Service* v. *United States*, 188 F. 2d 959, 963 (C.A. 6).

The information stated that the "effects of the aforesaid combination and conspiracy have been and are to unreasonably restrain the hereinbefore-described commerce in the sale and distribution of asphalt materials in the Broward County area" by increasing the price of asphalt material and by "suppressing and eliminating price competition among the defendant asphalt suppliers in the sale and distribution of asphalt materials" (R. 15). Such price-fixing by the defendants on their sales of asphalt materials would necessarily affect the movement or price of the constituent bitumen in its interstate or foreign flow. *United States* v. *Chrysler Corp. Parts Wholesalers*, 180 F. 2d 557, 560 (C.A. 9); *United States* v. *General Motors Corp.*, 121 F. 2d 376, 398 (C.A. 7), certiorari denied, 314 U.S. 618.[10] The indictment thus sufficiently alleges an effect upon commerce.

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[10] Having alleged a conspiracy to fix the prices of the goods in which bitumen was sold for ultimate use, it was not necessary for the information to contain additional allegations specifically directed to the effect of the local restraint upon interstate commerce, since "[a]s a matter of law, those effects are held automatically to ensue from price-fixing practices" (*United States* v. *Detroit Sheet Metal & Roofing Contractors Ass'n*, 116 F. Supp. 81, 86 (E.D. Mich.)). See also *United States* v. *General Motors Corp.*, 121 F. 2d at 398 ("any restraints affecting the retail market necessarily affect the wholesale transactions"); *United States* v. *St. Louis Dairy Co.*, 77 F. Supp. 853, 856 (E.D. Mo.), affirmed, 178 F. 2d 363 (C.A. 8), certiorari denied, 339 U.S. 942. ("[t]he control of prices 'where the interstate movement ends may operate directly to restrain * * * interstate commerce'").

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

ARCHIBALD COX,
Solicitor General.

WILLIAM H. ORRICK, JR.,
Assistant Attorney General.

LIONEL KESTENBAUM,
MICHAEL J. FREED,
Attorneys.

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